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Supreme Court of the United States

October Term, ~~1949~~ 1950

No. ~~100~~ 9

BERNICE B. FERES, as Executrix under the Last Will and Testament of RUDOLPH J. FERES, Deceased,

Petitioner,

against

THE UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, and Brief in Support Thereof.

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On Brief.

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Supreme Court of the United States

OCTOBER TERM, 1949.

No.

BERNICE B. FERES, as Executrix under
the Last Will and Testament of Ru-
dolph J. Feres, Deceased,

Petitioner,

against

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Jus-
tices of the Supreme Court of the United States:

The petitioner, above named, respectfully prays to
this Court for a writ of certiorari directed to the United
States Court of Appeals for the Second Circuit, to the
end that this Court may review the decision which
the said Court of Appeals has rendered in this case;
and the petitioner respectfully shows to the Court:

Federal Statute Involved.

This action is brought under the Federal Tort Claims
Act which is Title IV of Public Law, 601—79th Congress,
Chapter 753, Second Session, 60 Stat. 843, *et seq.* This
enactment appeared also in United States Code, Title 28,
Section 921, *et seq.*, and since September 1st, 1948, is
part of the new United States Code, Title 28, Secs. 1546B,
2401B and 2671-2680 inclusive. Reference will be made
to the sections appearing in the Public Law.

Statement of Case.

This action was brought under the Federal Tort Claims Act to recover for the alleged wrongful death of the petitioner's testator. Deceased was a First Lieutenant in the United States Army and died in a fire that swept the barracks in which he was quartered at Pine Camp, New York, on December 10th, 1947, after hostilities had ceased and removed from the combatant areas (R. 5).

The decedent was the husband of the petitioner who was appointed executrix and authorized to maintain the action (R. 5).

The complaint alleged (R. 6) that the agents of the United States were negligent in assigning the deceased to unsafe quarters because of a defective heating plant which caused the fire, and were further guilty of negligence in the supervision of the fireguard. Other specifications of negligence are alleged including failure to provide a safe place for the decedent to be quartered.

The complaint was filed August 19th, 1948, and no answer was filed by the Government. There was no trial and a motion made on the complaint to dismiss the action on November 8th, 1948. The order dismissing the complaint was entered February 10th, 1949, and on the 5th of April, 1949, appeal was taken to the United States Court of Appeals for the Second Circuit. The United States Court of Appeals on November 4th, 1949, rendered a decision affirming the District Court.

Jurisdiction of This Court.

The jurisdiction to review through the procedure of certiorari the decision of the Court of Appeals in this case is conferred upon this Court by provisions of Title 28, United States Code, Section 1254 and Section 2101.

The Question Involved.

This case brings before this Court the specific question left undecided in *Brooks v. United States*, 337 U. S. 49, 93 L. Ed. 884, May 16th, 1949, as to whether dependents of members of the Armed Services can recover under the Federal Tort Claims Act for death arising out of injuries received which were "incident to their service" and whether a soldier sleeping in a barracks far removed from the combatant areas and after hostilities was under a status equivalent to a soldier on furlough within the meaning of the Act and whether such particular status excluded him and his dependents from the coverage of the Federal Tort Claims Act.

The Reasons Why Certiorari Should Be Granted.

1. This case will present to this Court for the first time for decision the interpretation of the Federal Tort Claims Act which was expressly left open in the *Brooks* case, to wit:

(a) Does the Tort Claims Act cover injuries "incident to service;" and

(b) What is the meaning under the Act of the phrase "incident to service."

2. Since the issue affects the interpretation and application of an important new Federal statute arising and bound to arise in many instances that issue unquestionably ought to be settled and decided by this Court.

3. The Circuit Courts are in conflict on the issues presented in this case.

The Second Circuit in this case and in *Ostrander v. United States*, Fed. 2d , January 11th, 1950, denied recovery to the widow of a soldier who died from the injuries received on an operating table in a hospital

in this country and after hostilities had ceased. The Fourth Circuit in *Jefferson v. United States*, Fed. 2d , December, 1949, denied recovery for injuries to a soldier, arising out of the negligence of a Government employee, while undergoing a gall bladder operation.

In the *Ostrander* case, counsel for the petitioner here is counsel in that case and a petition for certiorari in the *Ostrander* case will be filed promptly. In the *Jefferson* case, counsel has been advised that a petition for certiorari will likewise be filed promptly.

On the contrary, the Tenth Circuit in *Griggs v. United States*, Fed. 2d , November 16th, 1949, permitted the wife of a soldier to recover for the death of her husband who died as a result of injuries received while under treatment in an army hospital at Scott Field, Illinois after hostilities had ceased. Counsel has advised that the Government intends to petition for certiorari in this case. In *Santana v. United States*, 175 Fed. 2d 320, June 10th, 1949, 17 Negl. Cases 89, the wife of a veteran was permitted to recover where the decedent had received injuries while a patient in a veterans' hospital after hostilities had ceased. Counsel has not been advised yet whether the Government will petition for certiorari in this case.

4. This case is thus one of great public interest and concern involving an important and novel question of Federal law which calls for the attention and judgment of this Court.

5. This case presents the issue as to whether the Federal Tort Claims Act is to be applied only to soldiers (and their dependents) who are on furlough and denied to thousands or millions of others who are members of the Armed Services and who may not be on furlough but under some other status.

6. This case should be reviewed and decided by this Court because it is respectfully submitted that it has been wrongfully decided by the Court of Appeals below contrary to the wording of the Act, its legislative history and purpose and creating distinctions and exceptions not warranted and throwing the application of the Act into confusion.

WHEREFORE, upon the foregoing and upon the annexed brief, a writ of certiorari should be issued under the seal of this Court to review the decision of the Court below.

Dated: January 24th, 1950.

BERNICE B. FERES,
As Executrix under the Last Will
and Testament of Rudolph J. Fe-
res, Deceased, Petitioner,

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